JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 556

SHEBA BRACELETS, INC., and ROBERT J. CARROLL,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed their conviction for violations of Section 1001, Title 18 U. S. C., upon four counts of the indictment.

(a) The Opinions Below.

The opinion of the District Court with respect to various motions is officially reported in 144 Fed. Supp. 939. The opinion of the Court below has not yet been officially reported; a copy thereof is hereto annexed as an appendix.

(b) Statement of Grounds of Jurisdiction.

1. The judgment of the Court of Appeals was rendered and entered on August 14, 1957.

2. Timely application for rehearing was made on August 29, 1957, and was denied on September 18, 1957.

3. The jurisdiction of this Court is invoked pursuant to 18 U. S. C., Rule 37, and 28 U. S. C., § 1254.

(c) Questions Presented for Review.

1. Whether Rule 41 (e) of the Federal Rules of Criminal Procedure should be limited to evidence obtained in violation of the provisions of the Fourth Amendment to the Constitution or, despite the clear language of said rule, it should be extended to evidence obtained in violation of a statutory right, as included in Section 7213 (a) of the 1954 Revenue Code, Section 1905 of Title 18, U. S. C., and obtained in violation of the express agreement made in good faith by a taxpayer and a government representative of the Tax Department and whether the Trial Court committed prejudicial error in overruling the objections to the introduction of such evidence and in denying a motion made during the trial to suppress such evidence.

2. Whether the immu[illegible]y of the defendants from an unlawful search and seizure and the constitutional right to receive a fair trial were violated by the courts below in applying Rule 41 (e) after the reason for the said rule was removed by the Trial Court in adjourning the case for one week to hear the motion to suppress the evidence alleged to have been illegally obtained in a situation where a period of almost five years elapsed between the date of the arrest, without a warrant, and the search and seizure without a warrant, and the date of trial, and almost four years elapsed between the date of the indictment and the date of trial, without the Government taking any action

to bring the case to trial until six days after having received the books and records of the defendants from a tax agent who borrowed same for the purpose of a tax examination with the express promise to return the same to the defendants.

3. Whether the right of the defendants to obtain a fair trial was violated by the conduct of the prosecution in making representations to the Court with respect to material facts and in failing to file an affidavit to support such representations as directed by the Court.

4. Whether the right to inspect the statements made by a government witness prior to trial, as established by this Court in *Jencks* v. *United States*, 77 Sup. Ct. 1107, may be taken away by the Court's finding that the testimony is consistent with said statements and whether an error in refusing to permit such inspection may be excused by application of the harmless error statute.

(d) Statutes and Rules Involved.

Title 18, United States Code, Section 1001. *Statements or Entries Generally.*

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 12, United States Code, Section 95(a). *Embargo on bullion or coin; hoarding; requirement of disclosure; penalties.*

> "(1) During the time of war or during any other period of national emergency declared by the Presi-

dent, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and * * *

Whoever willfully violates any of the provisions of this section or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment or both. As used in this section the term 'person' means an individual, partnership, association, or corporation. (Oct. 6, 1917, ch. 106, § 5(b), 40 Stat. 415; Sept. 24, 1918, ch. 176, § 5, 40 Stat. 966; Mar. 9, 1933, ch. 1, title I, § 2, 48 Stat. 1; May 7, 1940, ch. 185, § 1, 54 Stat. 179; Dec. 18, 1941, ch. 593, July 4, 1946, 11 F. R. 7517, 69 Stat. 1352)."
title III, § 301, 55 Stat. 839; Proc. No. 2695, eff.

Fourth Amendment to the United States Constitution.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Rule 41(e) of Criminal Procedure

"(e) *Motion for Return of Property and To Suppress Evidence.*

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence any-

thing so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Title 26, United States Code, Section 7213. *Unauthorized disclosure of information.*

"(a) INCOME RETURNS.—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, to-

gether with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

Title 18, United States Code, Section 1905. *Disclosure of confidential information generally.*

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to identify, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. June 25, 1948, c. 645, 62 Stat. 791."

Section 54.25, Title 31, C. F. R. *Licenses.*

"(a) Upon receipt of the application and after making such investigation of the case as it may deem advisable, the mint, if satisfied that gold is necessary for the legitimate and customary requirements of the applicant's industry, profession, art, or business, shall issue to the applicant a license on form TGL-12, TGL-13, or TGL-14, whichever is designated in rulings of the Secretary of the Treasury for the kind of business, industry, profession, or art in which the applicant is engaged."

Section 54.26, Title 31, C. F. R. Records.

> "Every person holding a license issued pursuant to § 54.23 shall keep exact records of all his acquisitions and deliveries of gold. His records shall contain the name, address, and license number of each person from whom he acquires, or to whom he delivers, gold (other than fabricated gold) and shall show the amount, date, and description of each such acquisition and delivery, and such records shall be available for examination by a representative of the Treasury Department for at least 1 year after the date of the disposition of such gold. If the person from whom such gold is acquired, or to whom such gold is delivered, does not have a license such records shall show, in lieu of the license number of such person, the section of the regulations in this part pursuant to which such gold was held or acquired by such person."

Sixth Amendment to the United States Constitution.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(e) Statement of Case.

The defendant Carroll was arrested without a warrant and a search of the premises of the defendant Sheba Bracelets, Inc., was made without a search warrant on September 28, 1951.

The indictment herein, filed on August 25, 1952, originally contained eleven counts, consisting of one conspiracy count charging petitioners and other defendants with con-

spiring to acquire and use gold so as to violate Section 95(a) of Title 12, U. S. Code, which was dismissed as to petitioners during the trial, and ten substantive counts, six of which were severed prior to trial, never tried and finally dismissed against the appellants. The remaining substantive counts, Two, Three, Ten and Eleven, charged the appellants with alleged misrepresentations in so-called End-Use Certificates executed by them in order to purchase semi-processed gold to be used in the manufacture of jewelry. The four counts relate to two separate certificates dated September 14, 1951 and September 28, 1951, respectively.

Counts Two and Three, which refer to the certificate of September 14, 1951, charge petitioners with having falsely represented that Sheba Bracelets, Inc., the corporate petitioner was regularly engaged in the manufacture of jewelry and that petitioners would use the gold sold to said corporate petitioner in the industry, profession or art in which the said corporation was regularly engaged. Counts Ten and Eleven make the same charges with respect to the End-Use Certificate made on September 28, 1951.

On May 31, 1956 an Internal Revenue Agent, who had previously received certain books and records from petitioners on the representation that they were being taken for a tax examination and on the express agreement to return same, violated said agreement and instead turned over the books and records of Sheba Bracelets, Inc. to the United States Attorney in charge of the instant prosecution without the knowledge or consent of petitioners. Although the case had been dormant for almost four years, the United States Attorney, on or about June 4, 1956, for the first time, pressed for a trial.

Up to June 13, 1956, petitioners were not represented by counsel and on June 14, 1956, counsel filed a notice of appearance and the case was adjourned over the summer, to September 11, 1956, when the trial began before Judge Palmieri and a jury (App. 3a).

It appears from the evidence adduced at the trial that for at least two years prior to April 1951 Sheba Bracelets, Inc., of which Carrol was an officer, had been licensed by the Treasury Department to manufacture, sell and trade in gold jewelry (R. 67; App. 19a).* Said licenses were issued by the Treasury Department after an investigation of the corporation had been made for the purpose of establishing that the corporation was engaged in the business of manufacturing jewelry (R. 74-76; App. 20a-22a). In April 1951 the End-Use Certificates, which required the purchaser of semi-processed gold to execute a certificate containing certain information, came into effect.

From April to September, 1951, the corporation bought various quantities of semi-processed gold from Kastenhuber & Lehrfeld, a licensed gold refiner, and executed, for such purpose, End-Use Certificates which were ultimately turned over to the Treasury Department (R. 171-177). The End-Use Certificates dated September 14, 1951 and September 28, 1951 are the subject matter of the instant proceedings. The material statements made by the appellants in those End-Use Certificates read as follows:

> "6. That the industry, profession or art requiring the use of gold in which he is regularly engaged is as follows:
>
> Manufacturing jeweler."

and

> "9. That the gold sold to him as a result of the representations made in this certificate will be:"

and the answer checked was:

> "Used by him in the industry, profession or art in which he is regularly engaged."

(Gov. Exs. 14, 15, 16).

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* Citations to the record on appeal filed in the Court below are indicated by prefix "R" and those to the petitioners' appendix are indicated by the prefix "App."

The gist of the charge was that the petitioners, who bought semi-processed gold from the Government and paid for same, did not use the gold in the manufacturing business. The prosecution endeavored to prove that instead the petitioners sold the semi-processed gold and, in that connection, relied upon inferences, speculations and innuendoes drawn from the testimony of an employee of Sheba Bracelets to the effect that the machinery of the corporation had not been used during the regular business hours (R. 224-256), from the testimony of a secret service agent to the effect that the machines at the premises of the corporation were dirty and dusty (R. 267) and that on several occasions he had followed Carroll from the place of business of Kastenhuber & Lehrfeld at No. 10 West 47th Street, New York City, where Samuel Diamant had a place of business, and on each of said occasions Carroll had a small package under his arm when he reached the premises No. 10 West 47th Street but left without such package (R. 270, 318, 436; App. 54a), and, finally, the testimony of one Joseph Magaraill, landlord of premises No. 721 Poplar Street, Philadelphia, Pa., to the effect that he did not know Frank Brooks, with whom, according to the books and records of the corporation, a substantial business in gold bracelets had been done (R. 450-455; App. 55a, 56a).

The prosecution apparently endeavored to leave the jury with the impression that Frank Brooks was a fictitious and non-existent person, although petitioners, as part of their case, called Joseph K. Pollack, Supervisor of the Bookkeeping Department of the First Pennsylvania Bank & Trust Company, of Philadelphia, who testified that Frank Brooks maintained a bank account with said bank from 1949 to 1951, which testimony clearly established that Frank Brooks was an existing person (App. 100a to 105a).

The name Frank Brooks was obtained from the books and records of Sheba Bracelets, Inc. These books and records were voluntarily turned over to the agents of the

Internal Revenue Service upon the express representation that they would be used for a tax examination and would thereafter be returned to petitioners but, in violation of said express agreement, the said books and records were, on May 31, 1956, turned over to the United States Attorney in charge of this case (App. 158a to 160a, 177a to 186a). Objection was made, on behalf of petitioners, to the introduction of these books and records in evidence (App. 33a, 34a) and a motion was made to suppress the evidence based upon these books and records, whereupon the Trial Judge adjourned the case so that a formal written motion could be made to suppress the books and records and the evidence based thereon (R. 658-660). Such motion was duly made (App. 159a ff.) and was denied (App. 198a).

Thereafter, and during the course of the trial, counsel for the petitioners endeavored to show that the information with respect to Frank Brooks was obtained from the books and records when they were turned over to the United States Attorney on May 31, 1956, and the United States Attorney made the representation to the Court that the information was obtained in July 1951, prior to the arrest, when Carroll voluntarily turned over the books to the Secret Service and the Audit Division, for their examination (R. 668, 689). However, counsel for the petitioners had objected to the statement of Mr. Ruskin because he was not in charge of the case in 1951 and first appeared in May, 1956. The Trial Court requested Mr. Ruskin to submit an affidavit of a person properly qualified to substantiate the facts as represented so that the same could be marked a court exhibit and made part of the record (R. 689, 690). No affidavit was ever filed by Mr. Ruskin in connection with said direction and there is no Court's Exhibit 8-A in existence as part of the record.

The trial resulted in a verdict of guilty against petitioners. The petitioner Sheba was fined $5,000 and the petitioner Carroll was sentenced to eighteen months on each

of the counts, to run concurrently, and fined $5,000. Upon appeal the judgments of the Trial Court were affirmed by the Court below. A timely application for rehearing was denied by the Court below.

(f) Jurisdiction of the Courts Below.

The District Court had jurisdiction under Title 26, U. S. C., Section 1001.

The Court of Appeals had jurisdiction under Title 28, U. S. C., Section 1291.

(g) Reasons Relied On.

As to Question 1:

Rule 41(e) should not have been extended by the Court to encompass a situation whereby the Government obtained the books from the Internal Revenue Service surrendered to it voluntarily for a tax investigation without the knowledge or consent, express or implied, of the taxpayer.

During the trial the Government offered in evidence books and records of Sheba Bracelets, Inc., obtained on May 31, 1956, from the Agents of the Internal Revenue Service. These books and records were voluntarily delivered to the agents by Carroll upon the representation that they were required for a tax examination and would be returned. No permission was requested of or consent given by Carroll for the delivery of the books and records to the United States Attorney.

These books contained entries of sales to one Frank Brooks of substantial quantities of gold bracelets. With these entries as a foundation the prosecution endeavored to establish that Frank Brooks was a fictitious and nonexistent person.

Objection was taken to the introduction of those books in evidence and subsequently a formal motion was made to suppress the evidence.

Petitioner Carroll, in his affidavit in support of the motion to suppress, stated that Agent Sikoff had told him that he wanted the books of Sheba Bracelets in connection with a tax investigation, which had nothing to do with the instant case, and promised that he would return those books in a few days or, at the most, in a week and, relying on said promise, he turned over to Mr. Sikoff the books and records (App. 159a). These statements are corroborated by the affidavit of Louis Sikoff, a Revenue Agent of the Internal Revenue Service attached to the Brooklyn office, who stated that the records of the corporation were requested from Carroll in connection with an income tax examination of the corporation then in progress and that he had turned the records over to Special Agent Boller, of the United States Internal Revenue Service (App. 177a, 178a). Agent Boller likewise made an affidavit stating that in connection with the official income tax investigation of Sheba Bracelets, Inc., he borrowed from Revenue Agent Sikoff the books and records of Sheba Bracelets and on May 31, 1956, turned over said books and records to Assistant United States Attorney Ruskin, at his request (App. 179a). Carroll's statement is also corroborated by receipts given for other records obtained from Sheba Bracelets, Inc., which appear at pages 185a and 186a of the appendix, signed by Agent Boller and expressly stating that the books had been voluntarily submitted and "are to be returned."

The Court of Appeals approved the denial of the motion to suppress by the Trial Judge solely upon the ground that the motion was made during the trial and not in advance of the trial, applying Rule 41(e) of the Federal Rules of Criminal Procedure.

One of petitioners' main contentions is that the delivery by the Revenue Agents of the books and records to Mr. Ruskin on May 31, 1956, on the eve of trial, was in violation of the express agreement and promise to return the books

to petitioners and in violation of Section 1905 of Title 18, U. S. Code, and Section 7213(a) of the 1954 Revenue Code, which had the effect of making it criminal for revenue agents to furnish the books to the United States Attorney for use by him in a criminal prosecution having nothing to do with taxes.

The Court of Appeals did not decide this fundamental issue on the merits but simply denied the motion to suppress for untimeliness.

Rule 41(e) of the Federal Rules of Criminal Procedure, by its express wording, is limited to evidence obtained by the Government by "search and seizure." The Court below, in its opinion, recognized that the manner in which the United States Attorney obtained the books from the Income Tax Bureau did not literally constitute a "search and seizure" of the sort described in Rule 41(e) but held that this Court and the Court of Appeals had extended the provisions of Rule 41(e) to situations other than "search and seizure."

We have been unable to find any case which takes the position adopted here by the Court of Appeals that Rule 41(e) may be extended to evidence obtained in violation of a statutory right or an agreement made in good faith by a taxpayer and a government official. On the contrary, two cases decided in the Second Circuit, one by the District Court and one by the Court of Appeals, stand for the proposition that Rule 41(e), except in wire-tap cases, should be strictly limited to evidence obtained in violation of a constitutional right.

In *United States* v. *T. Vincent Quinn et al.*, 17 F. R. D. 342, a motion was made to suppress certain books and records prior to the trial, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. Said books had been obtained by the government under exactly the same circumstances as prevail in the instant case. In that case too the taxpayer had turned over certain books and records to Internal Revenue Agents in connection with an investigation and said Internal Revenue Agents had turned over

said books to the United States Attorney. In the *Quinn* case, as in the instant case, those books were used in a prosecution of a matter entirely foreign to any tax matter and the only difference between the *Quinn* case and the instant case lies in the fact that the prosecution in that case was for a violation of Section 281, Title 18, U. S. C., while the instant case is for a violation of Section 1001, Title 18, U. S. C. Paradoxically, the motion in the *Quinn* case was denied as premature, as recently as April 26, 1955, and District Judge Bicks, in denying said motion, stated, at page 346, as follows:

> "Absent statutory provision or other compelling authority to the contrary, I am of the view that in criminal cases objections to the admissibility of evidence should not be passed upon in advance of trial."

As far as can be ascertained this was the only authority on the subject prior to the making of the motion by petitioners. Counsel for petitioners was entitled to rely on the *Quinn* case and had he made such a motion prior to the trial said motion would have been denied by the District Court as premature under the authority of the *Quinn* case.

The decision of the Court of Appeals in the instant case is not only in conflict with the decision in the *Quinn* case but is also in conflict with *In re Fried, et al.*, 161 Fed. (2d) 453, which was decided by the same Court of Appeals. The question presented in that case was whether Rule 41(e) of the Federal Rules of Criminal Procedure should be extended to motions to suppress a confession. The Court of Appeals in that case held that Rule 41(e) was applicable only where constitutional rights were violated but when evidence was not procured in violation of constitutional rights but was procured in such manner as to render it inadmissible at the trial, a confession should not be suppressed in advance of the trial.

Judge Learned Hand, in a concurring opinion in the *Fried* case, was even reluctant to apply Rule 41(e) to evidence obtained in violation of a constitutional right

other than immunity from unlawful search and seizure but definitely excluded the application of Rule 41(e) to the violation of a statutory right by stating, at page 465, as follows:

> "Nevertheless, I wish strictly to confine it to the violation of a constitutional right; and to accept it only because of the higher respect in which these are traditionally held. Were it inevitable that all the privileges of an accused should be treated alike, so far as my vote was concerned, I should compel the accused to postpone even a constitutional objection until the trial. I should choose to impose upon him whatever risk that might entail, rather than to hobble the prosecution of crime by mincing the trial into successive separate determinations."

Ordinarily objection to the admissibility of evidence must be determined when it is tendered at the trial and not in advance of trial. Rule 41(e), which expressly relates to unlawful search and seizure, is an exception to the general rule and should be strictly construed. If additional exceptions to the general rule are created by the courts then the exceptions will eventually become the rule and a defendant in a criminal case will no longer be permitted to make any objections to the introduction of evidence at the trial. It is respectfully submitted that by extending the application of Rule 41(e) to the instant situation the courts below have so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

As to Question 2:

The Court of Appeals stated that the manner in which the United States Attorney obtained the books from the Income Tax Bureau did not constitute a search and seizure of the sort described in Rule 41(e) and affirmed the denial of the motion to suppress solely upon the ground of untimeliness, avoiding a determination upon the merits. Regardless of whether the manner in which the United States

Attorney obtained the books literally constituted a search and seizure and assuming that Rule 41(e) were applicable to evidence obtained in violation of a statutory right and in violation of an agreement, the question whether the motion was timely became academic when the District Court adjourned the trial for one week for the purpose of receiving affidavits and considering the motion to suppress.

The Court of Appeals cited the case of *Nardone* v. *United States*, 308 U. S. 338, 341, 342, as authority in holding that the motion to suppress was untimely and quoted from that case as follows:

> "Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention."

If the District Court had refused to interrupt the trial for the purpose of the motion to suppress then there would have been no room for complaint on the part of petitioners with respect to a determination based upon the exercise of discretion, but the Trial Court, in its discretion having interrupted the trial for one week, it can no longer be argued that the motion to suppress should be denied as untimely since the reason for the application of Rule 41(e) had been removed by the action of the District Court, as permitted by said rule.

Moreover, petitioners could not obtain a fair trial if upon the facts of this case a motion to suppress evidence illegally and improperly obtained could be denied upon the ground of untimeliness. Rule 41(e) expressly states that the motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. The record shows that petitioners did not have an opportunity to make the motion

before the trial and that they could not have been aware of the grounds for the motion until after May 31, 1956, when the books and records were turned over to the United States Attorney by the agents of the Internal Revenue Service without the knowledge or consent of petitioners.

The defendant Carroll was arrested on September 28, 1951, and the indictment against petitioners and the other defendants was handed down on August 25, 1952 (R. 1078-1092, App. 1a, 6a-14a). It appears from the endorsements on the indictment, as well as from the docket entries appearing on pages 1a to 5a of the Appendix that between August 1952 and June, 1956, the Government did not take any steps whatsoever to bring this case to trial and the case was completely dormant for almost four years from the date of the filing of the indictment. As a matter of fact the Government did not proceed in the usual manner to adjourn the case from time to time but marked the case off the calendar and the case so remained for several years. This inaction on the part of the Government in failing to bring the case to trial minimized the chances of the defendants to have a fair and speedy trial within the meaning of the Sixth Amendment to the Constitution.

It is significant that only after having received the books and records from the agents of the Internal Revenue Service did the prosecution indicate a willingness to proceed to trial and, as a matter of fact, press for immediate trial at a time when petitioners were not represented by counsel. The docket entries also show that the notice of appearance by counsel was filed on June 14, 1956 (App. 3a). In view of the approaching summer vacation the trial was adjourned to September 11th, when the trial began before Judge Palmieri. Under the circumstances of the related facts petitioners had no opportunity to make the motion prior to the commencement of the trial. A finding that the motion was untimely, as a basis for a denial of the motion to suppress, under all of the circumstances of the case, is violative of the fundamental principles of justice and fairness.

Without the books and records obtained on May 31, 1956, from the Agents of the Internal Revenue Service the Government could not have produced the circumstantial evidence with respect to Frank Brooks required to submit the case to the jury.

As a matter of fact, the District Court had denied the motion to suppress upon the authority of *Zap* v. *United States*, 328 U. S. 624, and mentioned the untimeliness only incidentally in connection with the search of the premises in September of 1952, a matter with which this Court is not concerned. The District Court found it unnecessary to decide whether the transfer of the books and records from the Internal Revenue Service to the United States Attorney was illegal or not upon the theory that "the Government is proceeding by legislative authority, not express individual consent."

The District Court was of the opinion that by taking out the gold license petitioners had consented to said search by reason of the Gold Regulations. Although the Court of Appeals left this point undecided, the instant case can be distinguished from the *Zap* case upon various grounds, to wit:

In the *Zap* case an inspection was made during regular hours at the place of business whereas in the case at bar the United States Attorney obtained the books from the Agents of the Internal Revenue Service, without the knowledge or consent of the petitioners, almost four years after the indictment had been filed against the defendants.

In the *Zap* case there was a contract between the Government and the defendant in which the defendant had agreed to an inspection of all of the books and records of the defendant by the Government and its representatives. Congress had provided for the inspection and audit of books and records of contractors such as Zap. The inspection and audit were authorized to be made "by a governmental agency or officer designated by the President or the Chairman of the War Productions Board." Certain officials of the Government, including the Secretary of the Navy, were authorized to exercise the power and they were also

delegated the power to authorize such officer or civilian officials of their respective departments to make further delegation of such power. The Federal Bureau of Investigation conducted the audit under the auspices and authority of an accountant and Cost Inspector of the Navy Department, under whose jurisdiction Zap's books and records had been placed for purposes of audit and inspection. The Court therefore held that the inspection by the Federal Bureau of Investigation was in effect an inspection by the Navy, although its officials were aided by agents of another department. The Court, in upholding the validity of the inspection, also based the decision upon the ground that the right to inspect, granted by the contract, was not limited to inspection by the Navy, but extended to any authorized representatives of the Government among whom the agents of the Federal Bureau of Investigation are included. The fact is that the inspection made by the Federal Bureau of Investigation, at the direction of the Navy Department, was directly in connection with the contract and pursuant to the terms thereof.

In the case at bar the right to inspect was limited to representatives of the Treasury Department for a period of one year after the disposition of the gold and limited to the particular records of acquisition and delivery of the gold.

In the *Zap* case there was a voluntary surrender of the records to the Federal Bureau of Investigation for the purpose of auditing with respect to work done under the contract, whereas in the instant case the books and records were not voluntarily surrendered to the United States Attorney by the appellants but were given to the Internal Revenue Agents solely in connection with an income tax investigation entirely unrelated to an investigation under the Gold Regulations. The surrender of the books and records by the Internal Revenue Agent to the United States Attorney on the eve of trial, without consent of appellants and in violation of their agreement to return the books and records "borrowed" from the appellants, can under no circumstances be considered a voluntary surrender since

the records included all books of account and exceeded the limited records involved in the Gold Regulation, were not given to a Treasury Agent, were not received by the United States Attorney for the purpose of inspection within the meaning of the Gold Regulation but solely for the purpose of prosecution, and were surrendered five years after the gold was purchased.

In the *Zap* case, the Court held that the Federal Bureau of Investigation Agents did not obtain access by force, fraud or trickery. In the instant case the Internal Revenue Agents represented that they wanted the books in connection with a tax investigation.

Moreover, the Supreme Court expressly stated in the *Zap* case that the consent to the inspection did not include the consent to the taking of the records. In fact the Supreme Court reiterates the fundamental rule laid down in *Weeks* v. *United States*, 232 U. S. 383, 34 Sup. Ct. 341, that private property obtained as a result of an unlawful search and seizure cannot be used as evidence in a criminal prosection of the owner. The Supreme Court also reiterates the rule laid down in *Silverthorne Lumber Co.* v. *United States*, 40 Sup. Ct. 182, 251 U. S. 385, that evidence unlawfully obtained should be suppressed on the theory that the Government may not profit from its own wrongdoing. In other words, the Supreme Court, in the *Zap* case, permitted the use of evidence illegally obtained for the sole reason that the defendant, by an express agreement, had explicitly permitted the inspection of the records in question and that in that case the obtaining of a search warrant seemed to be a mere technicality. Three Justices of the Supreme Court strongly dissented and, under no circumstances, can the holding of the majority be extended to a case in which no blanket consent for the inspection of all books and records was given by the defendant and where the inspection of one particular book was only permitted by Federal Regulations.

It is respectfully submitted that the Supreme Court, in the *Zap* case, never intended to reverse its ruling in the *Weeks* case, *supra,* in the *Silverthorne* case, *supra,* and in all other similar rulings subsequent thereto.

It follows from the foregoing that the *Zap* case, the main authority on which the District Court based its denial, has no bearing on the instant case and that the Courts below should have granted said motion on the merits. This is so even if the transfer of the books and records was literally a search and seizure, in violation of the Fourth Amendment to the Constitution, under the authority of the following cases.

Gouled v. *United States,* 41 Sup. Ct. 261, 255 U. S. 298;
Johnson v. *United States,* 68 Sup. Ct. 367;
Fraternal Order of Eagles v. *United States,* 57 Fed. (2d) 93;
United States v. *Mitchneck,* 2 Fed. Supp. 225;
Federal Trade Commission v. *American Tobacco Co.,* 44 Sup. Ct. 336, 264 U. S. 298;
United States v. *Lagow,* 66 Fed. Supp. 738;
Weeks v. *United States,* 232 U. S. 383;
United States v. *Guerrina,* 112 Fed. Supp. 126, modified 126 Fed. Supp. 609.

As to Question 3:

The objection made by the petitioners, during the trial, to the introduction of said books and records in evidence was based on the theory that the Government illegally obtained the books and records from the Internal Revenue Service on May 31, 1956, and as a result of such illegal act obtained the name of Frank Brooks and the information relative to the transactions with said customer. In order to refute said argument the Government contended that it had obtained knowledge of Frank Brooks back in July, 1951, when the petitioners turned over the books to the Secret Service Agents for their examination. In that

connection Mr. Ruskin, during the trial, made the following statement:

> "Your Honor, I just want to be clear if I am making this representation. What I am saying to your Honor is that we got the names of Frank Brooks and the other customers of Sheba Bracelets prior to July 1950—prior to July, 1951, from the examination of the books which was made in July 1951, when Mr. Carroll voluntarily turned the books over to the Secret Service and the Audit Division for their examination." (R. 688, 689)

After counsel for the petitioners had objected to the statement of Mr. Ruskin, because he was not in charge of the case in 1951 and first appeared in May, 1956, the Trial Court made the following direction:

> "But I want to make the record as clear as possible so that if there are any mistakes you can have them corrected. I will ask Mr. Ruskin to make the subject matter of his representation, to submit it to me in the form of an affidavit, either your own affidavit or the affidavit of a person properly qualified to substantiate those facts, so that I will attach that to Court's Exhibit 8, I will make that Court's Exhibit 8A, and then Mr. Palmer will have a complete record." (R. 689, 690)

No affidavit was ever filed by Mr. Ruskin in connection with said direction and there is no Court's Exhibit 8A in existence as part of the instant record on appeal.

The conclusion is inevitable that the Government obtained the name of Frank Brooks as a result of the illegal transfer of the books and records by the Internal Revenue Service to the United States Attorney.

The Court of Appeals made no mention of the failure of the United States to file an affidavit upon this very material point, although petitioners urged the failure to file that affidavit as a ground for reversal. Such conduct on the part of the prosecution was extremely prejudicial

to petitioners and deprived them of a fair trial, requiring a reversal of the conviction.

In *Berger* v. *United States*, 295 U. S. 78, this Honorable Court, at page 88, laid down the standard of conduct of United States Attorneys as follows:

> "The United States Attorney is representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

A compliance with the Trial Court's direction in the instant case was of extreme importance since one of the main issues raised during the trial was whether Frank Brooks, who, according to the books of Sheba Bracelets, Inc., was a substantial customer of the petitioner corporation, was a real or fictitious person. The apparent purpose of the direction of the Trial Court was twofold—firstly, to place upon the record, under oath, the facts to support the representations made by Mr. Ruskin; and, secondly, to include that affidavit in the papers used in connection with the motion to suppress. This conclusion is supported by the fact that the Court stated that such affidavit would be marked Court's Exhibit 8A.

The Court below, in its opinion, states that full knowledge of Frank Brooks and of the entries in the books concerning him came to the United States Attorney in May, 1956, in a manner concerning which petitioners cannot "now" complain. Since it has been heretofore shown that

the objections to the introduction of said books and records and the motion to suppress said books and records, made during the trial, were timely, petitioners' complaint about the illegal manner in which the United States Attorney obtained said books and records was not belated and the failure of the United States Attorney to file an affidavit in connection with said issue constituted prejudicial error and prevented a fair trial.

As to Question 4:

The case of *Jencks v. United States*, 77 Sup. Ct. 1107, gives the right to an accused to inspect statements and reports of Government witnesses in possession of the prosecution touching the subject matter of their testimony at the trial and offer same in evidence because only counsel for the accused is adequately equipped to determine their effective use for the purpose of discrediting the Government's witness.

The Court of Appeals held that the *Jencks* case does not apply to the Secret Service reports with respect to Frank Brooks for the reason that they had nothing to do with the testimony of any witness at the trial, and were not sought by the petitioners for use in examining or cross-examining any witness, and the privilege of examining the reports was not requested by the petitioner at all. The fact is that the defense had requested that said Secret Service reports be marked in evidence and that the Trial Court had denied said request, as appears by the following in the record:

> "Mr. Palmer: All right. All I am asking you then, when you get through with them, because I want to mark them in evidence to * * *.
>
> The Court: No, they won't be marked in evidence." (R. 888)

Petitioners' trial counsel realized that the denial of the application to mark said reports in evidence precluded him from examining said reports and he therefore did not

press for an examination of the reports which the Trial Court refused to mark in evidence.

That the inspection of said reports and their admission in evidence are treated by the Supreme Court as one and the same thing appears from the following holding in the *Jencks* case:

> "We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial. Accord, Roviaro v. United States, 353 U. S. 53, 60-61 * * *."

The Secret Service reports did relate to evidence introduced by the prosecution during the trial.

As heretofore stated, one of the salient issues in this case was the existence or nonexistence of Frank Brooks and the time when the Government had obtained knowledge of Frank Brooks through the examination of the books and records of the corporation.

The purpose of the request by petitioners' counsel to mark these reports in evidence was to discredit the statements made in the affidavit of John W. Braun submitted in opposition to the motion to suppress and to refute the representations of Mr. Ruskin to the effect that the Government had obtained knowledge of Frank Brooks in July, 1951.

The Court of Appeals, in its opinion, recognizes that the reports of Agent Newbrand, during his cross-examination, should have been turned over to the defense to be used in connection with the cross-examination of said witness, but holds that any error in refusing to hand them to defense counsel was a harmless one which did not affect the substantial rights of the petitioners for two reasons: (1) the use of the reports of Agent Newbrand on cross-examination would not have accomplished anything other than a demonstration that Newbrand had written, in his

reports, the same thing to which he testified at the trial; and (2) the guilt of the petitioners was overwhelming.

Under the holding in the *Jencks* case it is entirely immaterial whether the contents of said reports confirm or contradict the testimony of the witness at the trial since it is within the right of counsel for the defendants to determine the extent of the use that he may wish to make of the reports in connection with his cross-examination and the refusal to afford counsel that right constitutes reversible error even if the contents of the reports confirm the testimony of the witness at the trial.

The procedure adopted by the District Court was disapproved by this Court in the *Jencks* case in the following language:

> "Only after inspection of the reports by the accused, must the trial Judge determine admissibility."

The Government and the Court of Appeals endeavored to excuse the error committed by the Trial Court, in failing to turn over the reports of Agent Newbrand to petitioners, by applying the harmless error statute.

Moreover, the testimony of Secret Service Agent Newbrand was of the same crucial nature as the testimony of Ford and Matusow in the *Jencks* case and the impeachment of said testimony was singularly important to petitioners. In holding that the guilt of petitioners was overwhelming the Court below emphasized the testimony of Mr. Newbrand, to the effect that said agent had surveilled petitioner Carroll on seventeen days in September, 1951.

It appears clearly from the opinion of the Court of Appeals that without the testimony of Agent Newbrand there would not have been sufficient evidence to warrant the submission of the case to the jury.

That the majority of the Court in the *Jencks* case refused to apply the harmless error statute appears clearly from the opinion of Mr. Justice Burton, who concurred with the majority in the result but disagreed with the

Court's holding that the failure to produce the records to the defendant necessitated a new trial and stated that whether a new trial is required should depend on the contents of the requested reports, relying upon Rule 52(a) of the Federal Rules of Criminal Procedure.

To the extent that the decision in the case at bar is in conflict with the decision in the Jencks case, it is important that the Supreme Court review said decision and definitely create a guide for District Courts and parties with respect to whether the right of defendants to inspect records may be taken away by the Trial Court's finding that the testimony is consistent with the report, and whether an error in refusing to permit such inspection may be excused by application of the harmless error statute.

The guilt or innocence of petitioners should not have been determinative of the question as to whether a substantial right of the defendants was violated when the Trial Judge refused to turn over to defense counsel the reports of Agent Newbrand for the purpose of cross-examination. *Kotteakos et al.* v. *United States*, 328 U. S. 750, 763-764, 66 Sup. Ct. 1239, 1247; *United States* v. *Coplon*, 175 Fed. (2d) 629, 640.

Conclusion

It is respectfully submitted that the various questions raised in this petition are of such importance in the administration of criminal law that there should be an authoritative determination of the same by this Honorable Court. Accordingly petitioners ask that this Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Petitioners.

PALMER, MASIA & PALMER,
of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 293—October Term, 1956.

(Argued May 14, 1957 Decided August 14, 1957.)

Docket No. 24419

UNITED STATES OF AMERICA,

Appellee,

v.

SHEBA BRACELETS, INC., and ROBERT J. CARROLL,

Defendants-Appellants.

Before:

CLARK, *Chief Judge,*
SWAN and POPE, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge.*

Sheba Bracelets, Inc. and Robert J. Carroll, appeal from the judgments of conviction for violations of § 1001, Title 18, U. S. C., upon four counts of an indictment. Affirmed.

PALMER, MASIA & PALMER, *Attorneys for Appellants;* Samuel Masia and Henry H. Zolki, of Counsel.

PAUL W. WILLIAMS, United States Attorney, *for Appellee;* Robert Kirtland and Robert K. Ruskin, Assistant United States Attorneys, of Counsel.

POPE, *Circuit Judge*:

The appellants, Sheba Bracelets, Inc., a New York corporation, and Robert J. Carroll, its treasurer, were convicted upon four counts of an indictment under Title 18, § 1001, U. S. C.[1] In these counts the two defendants were charged with knowingly and wilfully making false, fictitious and fraudulent statements and representations in an "End-Use Certificate for Semi-Processed Gold." The false statements were charged to have been made in two certificates of that character on the 14th and 28th of September, 1951. The statements charged to have been false were (a) that the defendant Sheba was regularly engaged in the industry of manufacturing jewelry which required the use of gold; and (b) that certain gold which was sold to Sheba would be used by it in the industry in which it was regularly engaged.[2]

Sheba held a license issued to it under an executive order made pursuant to Title 12 U. S. C. § 95(a) which authorized it to acquire gold for use in the jewelry manufacturing industry.[3] On the dates mentioned in the indict-

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[1] "§ 1001. Statements or entries generally—Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] The case was tried upon these four counts, upon which the defendants were convicted, and also upon a count charging conspiracy to violate Title 12 § 95(a) U. S. C. providing for an embargo on bullion and gold and regulating transactions in gold or silver coin or bullion. The conspiracy count was dismissed at the conclusion of the Government's case.

[3] Executive Order No. 6260, which appears as a footnote to this section (at p. 451 of U. S. C. A.), provides that "No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin, gold bullion, or gold certificates except under license therefor issued pursuant to this Executive order."

ment, Carroll, for the corporation, delivered to a firm of gold refiners these end use certificates for the purpose of procuring the quantities of gold which Sheba was permitted to purchase under its license. The Government's evidence was that contrary to the representations made in the certificates, Sheba was not engaged in the manufacture of jewelry and the gold purchased was not intended to be used for such purpose, and was in fact disposed of otherwise.

One group of errors assigned by appellants relate to the court's denial of motions to suppress evidence alleged to have been obtained by the Government by unlawful means. Most of the other claims of error arise out of the court's refusal to require the prosecution to furnish the defendants certain written reports made at the time by Government Secret Service agents concerning events and activities testified to by them at the trial.

Insofar as it has any substance, the argument relating to the motion to suppress grows out of the circumstance that the Government produced evidence tending to prove that one Frank Brooks, who, according to Sheba's books, purchased its entire output of gold bracelets from March, 1951, on, was non-existent,—that there was no such person. This was a substantial part of the evidence which the Government adduced to show that Sheba manufactured no jewelry and had no customers for bracelets. The argument is that if the evidence which appellants say was illegally secured had been suppressed by the court, the Government could not have relied upon this proof as to the non-existence of Frank Brooks. They say that only through illegally obtained evidence did the prosecution procure the investigative lead or clue as to Frank Brooks; that the knowledge that the sole customer was supposedly one Frank Brooks was "knowledge gained by the Government's own wrong,"[4] and hence this proof could not be used at all.

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[4] *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392.

The manner in which the Government procured the evidence on which it relied for conviction was as follows: On July 25, 1951, Treasury agents went to the premises where Sheba purported to be manufacturing jewelry for the purpose of inspecting its books. Such inspection was authorized by the terms of the license.[5] Carroll was absent when the agents arrived. They waited for him and when he telephoned they talked to him explaining they were there to inspect the premises and examine the books. He stated he had no objection, but that his employees there present (employees of Carroll Instrument Co., a different concern of his), did not have sufficient knowledge of the books. He then made an appointment to meet the agents later in the day at the United States Assay office. At that time and place he was given a list of the books and records required, and two days later these were sent by Carroll to the agents by messenger. The agents kept them for a week returning them on August 3. Included was the Cash Receipts Book, the same book which was subsequently received in evidence at the trial as Exhibit 18. This was the book which recorded the sales of gold bracelets to Frank Brooks. It was while the agents were waiting for Carroll at the Sheba place of business that they noticed that although there was

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[5] In its original application for a gold license Sheba agreed that it "will keep exact records of all his acquisitions and deliveries of gold" and to "make such records available for examination by a representative of the Treasury Department at any time." Its license required it to "Keep all records prescribed under § 54.26 of the Gold Regulations." That section (Code of Federal Regulations, 1949 Ed. Title 31, Part 54, § 54.26) provided: "Records. Every person holding a license issued pursuant to § 54.23 shall keep exact records of all his acquisitions and deliveries of gold. His records shall contain the name, address, and license number of each person from whom he acquires, or to whom he delivers, gold (other than fabricated gold) and shall show the amount, date and description of each such acquisition and delivery, and such records shall be available for examination by a representative of the Treasury Department for at least 1 year after the date of the disposition of such gold."

jewelry manufacturing machinery there it was not set up for use, apparently merely stored there, and covered with dust.

Between April 2 and September 13, 1951, Carroll for Sheba purchased from Kastenhuber & Lehrfeld, New York gold refiners, 15,000 ounces of gold, valued at $534,000. These were acquired in separate purchases of approximately 150 ounces each, and on each occasion an end use certificate executed on behalf of Sheba, was delivered to the refiners. Carroll's procedure, in making these purchases, followed a fixed pattern. He would meet a Louis Fisher at a bank, where Fisher would hand him a sum of cash. He would then get a certified check from the bank and with that pay for the gold. The 150 ounces, usually in three bars, would be wrapped in brown wrapping paper when delivered to Carroll.

In September, 1951, Treasury agent Newbrand began following Carroll after he made these purchases. On seventeen different days during that month Carroll would emerge from Kastenhuber & Lehrfeld carrying the package wrapped in brown paper and would go to a building at 10 West 47th Street in Manhattan in which was located the office of Mr. and Mrs. S. Diamant. (Mrs. Diamant was a cousin of Louis Fisher, who delivered the cash to Carroll.) On each occasion Carroll would emerge from the building five or ten minutes after he had entered, and without the package of gold. On September 28, the last of these seventeen days, Agent Newbrand followed him upstairs in the building and saw him enter the Diamant office. When he came out without the package, Carroll was placed under arrest by the agent. Within a half hour another agent arrived with a search warrant for the Diamant office, but upon search no gold was found there. There was then no warrant for Carroll's arrest, and as we shall hereafter note, defendants made much ado about this arrest without a warrant. A reading of the record gives the impression that the defense was contending that because the arrest was

an illegal one, the consequence was not merely that evidence taken as an incident to that arrest would be subject to a motion to suppress, but that its effect was to give the defendants an immunity from prosecution.

At the time of the arrest a felony had been committed and there was reasonable cause for believing that Carroll had committed it (Cf. *United States* v. *Perez*, 2 Cir., 242 F. 2d 867, 869). The officer had authority to make such arrest.[6] While the arrest would appear to have been a lawful one, yet nothing turns upon whether it was or not, for it does not appear what if anything was taken from Carroll at the time of his arrest, and nothing so taken was offered or received in evidence against the defendants. Hence the circumstances of the arrest could not be an occasion for an effort to suppress evidence.

In the afternoon of the day of Carroll's arrest, Newbrand with another Treasury agent went to Sheba's place of business in Brooklyn. They had no warrant to search those premises, which were in the main occupied by Carroll Instrument Co. The foreman of the latter company gave them permission to look around the premises. They made an inventory of the gold manufacturing machinery, which was stored in the rear of the place, and they took with them three sales invoice tablets, several Post Office Department return receipt cards, several cancelled checks, and a sheet listing names of Brazilian companies.

Appellants undertake to characterize this occurrence as an illegal search and seizure, and say that knowledge of Frank Brooks "came from the books and records illegally seized on September 28, 1951, the date of the arrest of the defendant Carroll." There is no proof to support that

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[6] Title 18 U. S. C. § 3056 authorizes Secret Service officers to "detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations and securities of the United States and of foreign governments." The falsified end-use certificates were a part of the Government's system of regulation of bullion and coin provided for in Title 12, § 95(a).

assertion, and the fair inferences from the record are all to the contrary. It nowhere appears that on that occasion either of the agents examined the books, or more particularly, the Cash Receipts Book, where the Frank Brooks name appeared.[7] So far as that book was concerned, there is no showing that there was any search of it on that occasion, nor of any other record referring to Frank Brooks, and definitely there was no seizure of it, for it remained in defendants' possession. As for the tablets, the return receipt cards, the checks and the list of Brazilian companies they did take, none of them were offered in evidence.

The Cash Receipts Book, with its entries re Frank Brooks remained in Sheba's possession until April, 1954. At that time a revenue agent of the International Revenue Service was making an income tax examination of Sheba for the years 1948 through 1951, and Carroll was requested to furnish Sheba's records for the agent's use in connection with that examination. Carroll complied, and delivered the books and records, including the Cash Receipts Book, to the office of the District Director at Brooklyn. Carroll's affidavit in support of his motion to suppress these books as evidence stated that the Internal Revenue agent had promised to return the books within a short time.

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[7] The court was warranted in inferring that counsel for defendants carefully avoided any inquiry as to whether the agents examined the books on that occasion. Counsel cross-examined agent Newbrand as follows: "Q. When you were in the place on September 28th, before you left, did you see any books and records there of the Sheba? A. Yes, I believe I did. Q. Afterwards did you see those books and records in 90 Church Street or anywheres else, or in the District Attorney's office? A. Yes, I saw them in the United States Attorney's office. Q. When? A. In June. Q. In June? A. 1956. Q. Did you see them before that time? A. No, I don't believe so." The trial court later remarked to defense counsel that this appeared to be "adroit" questioning: "Then you left it and dropped it very quickly at that point."

The books were not returned, and in May, 1956, the examining agents turned them over to the United States Attorney at his request. It was thus that the prosecution gained access to the books and had them available for introduction at the trial which opened on September 11, 1956, some four months later.

When the United States Attorney received those books, § 7213(a) of the 1954 Revenue Code made it unlawful for any officer or employee of the United States to permit any book containing particulars of income returned by a taxpayer to be seen or examined by any person except as provided by law. § 1905 of Title 18 U. S. C. prohibits any officer or employee of the United States to divulge, disclose or make known in any manner or to any extent not authorized by law any information coming to him by reason of any examination or investigation made by such officer or employee where that information concerns the amount or source of income of any corporation.[8] Appellant argues that it was unlawful for the revenue agents to furnish these books to the United States Attorney for use by him in a criminal prosecution, particularly for an offense having nothing to do with taxes.

Appellant contends that such an unauthorized delivery of these books to the prosecuting officers was tantamount

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[8] § 1905 Title 18 U. S. C.: "Disclosure of confidential information generally—Whoever, being an officer or employee of the United States * * * publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the * * * identity, confidential statistical data, amount or source of any income, * * * of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

to an unlawful and unreasonable search or seizure; that in law it amounted to the same thing, and that therefore appellants were entitled to have these books suppressed as evidence and returned to them; that they were improperly received in evidence, and the prosecution was improperly permitted to use the fruits of their unlawful acquisition in turning up the evidence with respect to Frank Brooks.[9]

Of course Sheba, though a corporation, was entitled to claim the protection of the Fourth Amendment. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. But we find it unnecessary to pass upon the validity of this contention of appellants. Even if it be assumed that the delivery of these books to the United States Attorney was contrary to law, and that his obtaining them was tantamount to an unlawful search and seizure,[10] appellants

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[9] Appellants' theory with respect to this is best stated in an affidavit filed by Carroll in support of the motion to suppress as follows: "Deponent is also informed by his attorney that under the authorities above cited the documents seized by the Government must be returned to deponent, or at least that those documents cannot be admitted in evidence. In this connection deponent is informed by his attorney that it is entirely immaterial whether the documents in question were taken by the Government by force or whether some of those documents were turned over by deponent to the Agent of the Internal Revenue Bureau after his arrest when they stated that they were making an investigation of deponent's books for tax purposes. Deponent is informed by his attorney that any such turning over of said books and records cannot be considered as voluntary since anything done by deponent after his arrest must be presumed to have been done under compulsion."

[10] We assume that the argument sought to be made with respect to the use by the prosecution of books which had been voluntarily delivered to the Revenue Agents solely for an income tax investigation is based upon the reasoning that if the Government can first require a person to produce his books for an income tax investigation pursuant to the requirements of the Internal Revenue Code (§ 3614 of the 1939 Code and § 7602 of the 1954 Code), and then search through them and ferret out evidence to be used in the prosecution of offenses not related to taxes, then there has been a substantial

waived any right they may have had to move for their return by their failure to make timely application to suppress them.

All of the facts relating to Carroll's arrest, to the Treasury agents' visit to Sheba's premises on September 28, 1951, and the fact that Sheba's books which had been delivered to the Director of Internal Revenue had come into the hands of the United States Attorney, were known to Sheba and Carroll long before the case came to trial. Yet it was not until after the Government's case in chief had been concluded and some evidence had been offered on behalf of defendants that defendants' motion to suppress was presented to the trial court.

The trial was begun on Tuesday, September 11. At the end of the day on Thursday, September 13, the court excused the jury until the following Monday to meet the convenience of persons in attendance at the trial who desired to commence the celebration of the Jewish holiday at the end of the following day. Counsel were required to attend the following morning, September 14, and it was at that time that defendants moved to dismiss sundry counts in the indictment and undertook to argue the question of

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denial of such persons' Fourth Amendment right "to be secure in their persons, houses, papers and effects." *United States* v. *Guerrina* (D. C. E. D. Pa.), 112 F. Supp. 126, appears to be the only case tending to support that contention. The order suppressing evidence in that case was subsequently withdrawn upon a reconsideration of the case. *United States* v. *Guerrina*, 126 F. Supp. 609. *United States* v. *Wolrich* (D. C. S. D. N. Y.), 129 F. Supp. 528, differs from this case in that the court there, upon hearing of a motion to suppress, agreed to hear evidence on the question whether the taxpayer's books and papers were obtained by the tax officials through fraudulent misrepresentations as to the purpose of the investigation. Some general references to the question have been made in *Scanlon* v. *United States*, 1 Cir., 223 F. 2d 382, 384, and in *Boren* v. *Tucker*, 9 Cir., 239 F. 2d 767. In both cases the proposed use of the evidence supplied to the Revenue Agents was in the prosecution of crimes defined by the Internal Revenue Code.

the legality of Carroll's arrest, of the alleged search and seizure of Sheba's premises on September 28, 1951, and of the process by which the United States Attorney procured Sheba's books from the revenue agents. The motion to suppress, supported by affidavits, was presented on the following Tuesday, September 18.

The court held that there had been a waiver of any constitutional right defendants may have had by their failure to move to suppress the evidence in advance of the trial; and found that not only defendants, but their counsel, also, knew about all these circumstances months prior to the trial. The court said: "Since I believe that it would not further substantial justice to allow a motion to suppress this evidence in the midst of the trial I deny this part of the motion."

The showing made on the motion to suppress was such as to compel the court's finding that defendants were aware of all the circumstances relating to the alleged improper procuring of evidence long before the case came to trial. Thus Carroll in his affidavit in support of the motion to suppress stated that about six months after his arrest an Internal Revenue agent asked to check the records of Sheba for tax purposes and examined the records on the premises; that the agent asked Carroll for other books and records, apparently missing, and Carroll informed him "that the Secret Service agents had searched the premises and were seen to have removed certain records." After reciting that he later allowed another Internal Revenue agent to have his books for a tax investigation said to have nothing to do with the indictment, Carroll continued that in spite of the agent's promise to return the books, deponent "never saw those books again until June of 1956, when he visited the office of the United States Attorney in charge of the case." It was then for the first time that deponent learned that the Internal Revenue Department had turned over the books which were given to them in connection with the alleged tax investigation to the United States Attorney's office for the purpose of the instant proceeding."

The court was satisfied that defendant's counsel also visited the United States Attorney's office about the same time, and saw the books there. Not only did that appear from the affidavit of the Assistant United States Attorney, but in his opening statement to the jury counsel for the defendants said that he had seen Sheba's books in the office of the Assistant United States Attorney "when they called us down to their office." Counsel had entered his appearance for the defendants on June 15, 1956, and at that time made a statement to the court complaining about Carroll having been arrested without a warrant and asking that there be returned various papers then taken from Carroll.[11] The court was also justified in disbelieving as wholly incredible he assertion of the defendants that it was not until during the trial that they learned for the first time that Carroll's arrest and the search were made by the Government without warrants. In any event, as stated by this court in *United States* v. *Chieppa*, 241 F. 2d 635, 638, "If they were unaware of the lack of a warrant, they could have easily acquired that information far in advance of the trial."

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[11] It is not difficult to understand why the court accepted the Governement's assertion that defendants were fully advised as to the circumstances relating to the Government's procuring of books long before the date of the trial. Thus the following colloquy occurred between the court and counsel for the defendants: "The Court: Just one last question. Do you admit having told Mr. Ruskin in substance, in June that you were concerned about the legality of the arrest and the seizure of papers from the person of Mr. Carroll and that you wanted an inventory of what they seized? Mr. Palmer: I have no recollection, honestly, of a conversation of that kind. I know we were in there kidding with each other, because I wanted my client to get hold of the records, which finally turned up in their office, but I have no recollection of any particular conversation along that line, because I never knew he wasn't arrested legally. The Court: I have a feeling that you may very well have waived whatever rights you have by not making a timely motion. Mr. Palmer: I am sorry, I wasn't in the case. The Court: But you don't deny making the statement; you don't recall it, but you don't deny it."

Actually what transpired when the agents went to Sheba's premises on September 28, 1951, is irrelevant here in view of the fact that the Cash Receipts Book with its entries relating to Frank Brooks came into the hands of the United States Attorney in May, 1956, and thus the information and knowledge as to Frank Brooks was available from a source wholly independent of anything that may have transpired on September 28, 1951. If we were to assume that the agents improperly obtained knowledge about Frank Brooks on September 28, 1951, that would not mean that the Government could not use information about Frank Brooks which it later obtained from another source. Facts improperly obtained do not become secret and unaccessible. If knowledge of them is gained from an independent source they may be proven like any others. Cf. *Nardone* v. *United States*, 308 U. S. 338, quoting from *Silverthorne Lumber Co.* v. *United States*, *supra*. The important single fact here is that knowledge of the purported dealings with Frank Brooks came into the hands of the United States Attorney when he received the books from the Revenue Service. This was known to the defendants in June, 1956, substantially three months prior to the date of the trial.

It has long been the rule, certainly ever since the decision in the *Weeks* case (*Weeks* v. *United States*, 232 U. S. 383), that a defendant desirous of taking advantage of his right to object to the use of evidence obtained illegally or in violation of his rights under the Fourth Amendment must move to suppress and have the books or evidence returned to him in advance of the trial unless the circumstances are such that he is without the necessary knowledge or opportunity to do so. This rule has now been incorporated in the last sentence of Criminal Rule 41(e),[12] but it is merely a re-

[12] "The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion but the court in its discretion may entertain the motion at the trial or hearing."

statement of the law as it was previously. *United States* v. *Di Re*, 2 Cir., 159 F. 2d 818, 820.

The manner in which the United States Attorney obtained the books from the Income Tax Bureau did not literally constitute a "search and seizure" of the sort described in Rule 41. But the same reasons which gave rise to the original rule that a motion to suppress evidence must ordinarily be made before trial, would clearly operate here to require us to sustain the trial court in exercising its discretion to refuse to suppress the books obtained from the Internal Revenue Service on the ground that motion was not timely made. Those reasons were stated in *Segurola* v. *United States*, 275 U. S. 106, 111, as follows: "This principle is that, except where there has been no opportunity to present the matter in advance of trial, * * * a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal case permit a collateral issue to be raised as to the source of compe[illegible] evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it." In *Nardone* v. *United States*, *supra*, dealing wtih evidence claimed to have ben obtained as a result of unlawful wire tapping, the court said (p. 341: "Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention * * * And if such a claim is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim."

In *United States* v. *Salli*, 115 F. 2d 292, 293, this court, citing both the *Segurola* and the *Nardone* cases, in upholding the trial court's refusal to entertain motions to suppress evidence alleged to have been obtained through unlawful search and seizure, said: "But the defendants may not raise the question here because they waited until the trial came on—four months after the indictment was found—before they raised it * * * There is every reason why [the Supreme Court should express the views as in the *Nardone* case] when the facts are all available in season; nothing is more unfair than to leave open a preliminary inquiry which will make the whole prosecution abortive, and thus put the authorities and their witnesses to the trouble and expense of useless preparation." Similar views have been expressed by this court in *United States* v. *Sansone*, 231 F. 2d 887; *United States* v. *Chieppa*, *supra*; and *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925.

We hold that the trial judge had a similar discretion to refuse to suppress the books of Sheba received from the Internal Revenue Service and the evidence resulting therefrom because whatever right Sheba might otherwise have had to object to the manner in which the books were obtained, was waived through its failure to move to suppress until midway in the trial of the case.

The Government has argued that since Sheba had applied for a license, and thus agreed to regulations which required it to keep records which are to be "available for examination by a representative of the Treasury Department," it must be deemed to have consented to the use that the Government officials made of its books, and to have waived its claim to privacy under the rule of *Zap* v. *United States*, 328 U. S. 624, 628. Whether the waiver was found in the *Zap* case only because the inspection "was made during regular hours at the place of business," and whether the facts of this case would require a different conclusion

need not be considered by us, for, as we have seen, failure to move to suppress the evidence before the trial is fatal to appellants' position in any event.

This brings us to the second group of contentions made by the appellants—those relating to the refusal of the court to require the prosecution to furnish certain written reports of the Secret Service agents to the defendants.[13] The first set of Secret Service reports requested had nothing to do with the testimony of any witness at the trial, nor were they sought by defendants for use in examining or cross-examining any witness. In fact, the privilege of examining them was not requested by the defendants at all. What happened was that during the trial when counsel for the defendants were asserting that the Government had learned about Frank Brooks by a search of Sheba's premises on September 28, 1951, the prosecutor made the statement that the Government had obtained knowledge of Frank Brooks and was actually making investigations concerning him prior to that date and in consequence of information obtained through the inspection of Sheba's books in July, 1951, when Carroll sent them by messenger to the Assay Office.

After this statement had been made by the United States Attorney, defendants' counsel asked the court to examine those reports for itself for the purpose of checking the accuracy of this assertion. The court agreed to do so and the reports were handed to the court by the Government. Thereupon the following colloquy occurred between defendants' counsel and the court: "Mr. Palmer: Will they be marked as a Court Exhibit? The Court: I will put them in a sealed envelope and they will be marked as a Court exhibit in a sealed envelope. Mr. Palmer: Very good.

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[13] The complaint respecting the refusal to furnish defendants these reports was not made until after the case had been argued and submitted. After the decision in *Jencks* v. *United States*, — U. S. — (June 3, 1957), appellants applied for and were granted leave to file a supplemental brief for the purpose of urging that the rule of the *Jencks* case required a reversal here.

The Court: And will not be subject to your scrutiny, but they will be available for the scrutiny of the appellate court, if the appellate court is so advised. Mr. Palmer: All right." No further request was made in respect to those reports. It is plain that their examination by the court *in camera* and without showing them to counsel for the defendants could under no circumstances constitute prejudicial error since, for the reasons here previously indicated, it was of no consequence whether the Government did or did not know about Frank Brooks through the July examination. It is plain that full knowledge of him and of the entries in the books concerning him came to the United States Attorney in May, 1956, in a manner concerning which the appellants cannot now complain. Nothing in the *Jencks* case supports any claim of error in respect to these reports.

The next ruling concerning Secret Service reports of which appellants complain had to do with the refusal of the court to call for and examine the report of Secret Service Agent Sweeney. Agent Sweeney was called as a witness by the defense which procured from him the testimony that when Carroll was arrested on September 28, 1951, the agents did not have a warrant for his arrest. On cross-examination Government counsel elicited from the witness testimony that he also had observed Carroll going into the Diamant building on September 17 or 18, 1951, carrying a package which he had left behind him when he came out a few minutes later. There was no further examination of Sweeney by the defendants and the witness was excused. The defense proceeded to call other witnesses. Both sides rested and the testimony was closed. This was on Friday afternoon, September 21, 1956, and the court adjourned until the following Monday morning, at which time arguments to the jury were to begin. On Monday morning, as the jury were waiting to hear summations, counsel for the defendants made the following request: "Another thing, if your Honor please. Will you be good enough to scrutinize the report by Mr. Sweeney, as to whether or not on the 17th or 18th of September he actually went into the premises of 47th Street and saw Mr. Carroll

go inside with the package and come out without the package?'' This the court declined.

It is plain that there was no error here. Not only had witness Sweeney been excused and the taking of testimony closed, but there was no suggestion on the part of the defendants that Sweeney's reports were sought for the purpose of aiding in any examination of Sweeney. Presumably Sweeney had left the courthouse, and there was no showing that he would have been available even if the court had been willing to reopen the case and order him recalled. "Whether a case may be reopened for further evidence rests in the sound discretion of the trial court and it will not be interfered with unless clearly abused." *People* v. *Siciliano,* 4 Ill. 2d 581, 123 N. E. 2d 725, 731. See, in accord, *State* v. *Shea,* —— R. I. ——, 75 Atl. 2d 294, 296; *State* v. *Massey,* —— Mo. ——, 219 S. W. 2d 326, 332. *United States* v. *Bayer,* 331 U. S. 532, 537-539, is, we think, an application of the same rule. Under the circumstances here there was no showing of an abuse of the court's discretion in rejecting the demand for the Sweeney reports. Nothing in the *Jencks* decision, *supra*, lends any support to the appellants' position on this.

During the cross-examination of agent Newbrand, counsel for defendants inquired whether he found a foot press at Sheba's premises. When the witness stated he did not recall, he was asked whether his notes would show; he replied that they would, and he was asked to look at them. He said he did not have the notes. He was requested to produce them and was so directed by the court. He produced his handwritten notes of what he did on September 28, 1951, the day on which he made the list of machines inquired about. The notes were marked as an exhibit and turned over to defendants' counsel. Counsel then inquired about reports of Newbrand's surveillance of Carroll on days prior to September 28, and was informed by the witness that these were all typewritten formal reports. He asked that they be produced: they were produced and scrutinized by the court, which marked them as court's exhibits.

Among the formal reports thus produced was one of September 28, 1951, verbatim the same as the handwritten notes for that date which had been furnished to the defendants' counsel. From this formal report of this date the court furnished defendants' counsel the page listing the equipment found at Sheba's premises on that date, but the remainder of the formal reports which referred to the surveillance of Carroll on September 5, 6, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 25, 26 and 27, although examined by the court, were not handed to counsel for the defense as he requested.

The Government concedes that under the decision in the *Jencks case, supra,* these reports should have been turned over to the defense, but asserts that the failure of the court to do so was not prejudicial and should be considered harmless error within the meaning of Rule 52(a) of the Rules of Criminal Procedure.[14]

True enough if these reports of Agent Newbrand had been furnished to defense counsel he might have used them in connection with his cross-examination of this witness. These particular typewritten reports were marked as "Court's Exhibit 6 for Identification" and are part of the record before this court. The description in them of Newbrand's surveillance of Carroll on his trips with the gold from the refiners to the premises occupied by the Diamants is in every particular the same as set forth in the handwritten notes of the September 28 surveillance. It will be recalled that the testimony was that on each of those seventeen days Carroll went through precisely the same movements in the delivery of the gold. It is difficult to see that the use of these reports on cross-examination would have accomplished anything other than a demonstration that Newbrand had written in his reports the same thing to which he testified at the trial.

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[14] "Rule 52(a): Harmless Error. Any error, defect, irregularity, or variance which does not affect substantial rights should be disregarded."

But it is abundantly clear that any error in refusing to hand them to defense counsel was a harmless one which cannot, under any circumstances have affected the substantial rights of the defendants. This is so because the evidence of the guilt of the defendants was simply overwhelming. In the six months period April through September, 1951, Carroll on 94 different days purchased approximately 150 ounces of fine gold from the refiners. This was established by the production of 94 end-use certificates, including the two described in the indictment, from the records in the office of Kastenhuber & Lehrfeld. The certified checks which paid for the gold were produced and the gold that Carroll and Sheba acquired during that period amounted to approximately 15,000 ounces at a total cost of $534,000. As before indicated, on the 17 days in September on which Carroll was followed, the gold was left in the building occupied by the Diamants, and on the final day, Septemer 28, it was observed to have been left in Diamant's office. That on search, 30 minutes later, no gold was found does not disprove that it was left there, as it was shown there was opportunity to dispose of it, and the arrest of Carroll had taken place under Diamant's window and in plain sight.

There is no proof as to just what became of this 15,000 ounces of gold, but there was abundant and overwhelming evidence that none of it was used in the manufacture of jewelry. According to the Cash Receipts Book, Sheba sold the whole of an entire output for that period of approximately 10,000 bracelets to Frank Brooks of 712 Poplar Street, Philadelphia, at a total price of approximately $600,000. An employee of the Carroll Instrument Co., who worked on the same premises, and who was in the same room where Sheba's machinery was located every working day from July 2, 1951 until March, 1952, testified that he had never seen that machinery being operated, or any jewelry made, or any gold; that the machines were dusty and dirty and covered with cobwebs; and that although he

left the premises about 5:30 in the afternoon each day, Carroll, who came to the place for approximately one-half hour each afternoon, always left the premises before he did.

When the Treasury agents inspected the place in July, 1951, with Carroll's consent, they also noticed the dusty and unused condition and position of the machinery. They asked Carroll about this and he explained that the machines were in that shape because a Mr. and Mrs. Popper who operated the machines had been on vacation ten days. This explanation was demonstrated to be false. The entry in the Cash Receipts Book showing the sales of the entire output to Frank Brooks was also false, for the owner of the whole of the premises at 712 Poplar Street, Philadelphia, testified that he had lived there for 26 years, had never heard of Frank Brooks, that no person by the name of Frank Brooks had ever lived at that address, and that he knew of no such person. No witness was produced to show what became of this 15,000 ounces of gold; no person was produced to show that he had been employed to manufacture bracelets or anything else from this gold. If bracelets were sold to some person other than Frank Brooks, there was no apparent effort made to produce such person.[15]

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[15] A feeble effort to produce evidence that there had been a Frank Brooks of 712 Poplar Street, Philadelphia, was made when the defense issued a subpoena under which an officer of a Philadelphia bank appeared and testified that an account had been opened in that bank in the name of Frank Brooks of 712 Poplar Street, Philadelphia, on September 22, 1949. The account was closed on June 29, 1950. The witness had never seen the person who had opened the account, but testified that the records which he produced showed that it was "a very peculiar account" in that it indicated that the intention of the depositor who had opened the account with $200 was merely to keep the account at that amount, and that when deposits were made, checks for substantially the same amounts would be presented on the same day so that the account ran along for the two months in which it was actually active with a running balance of only about $200. This evidence would be as likely to indicate that the account was fictitious or simulated as that there was a person by the name of Frank Brooks of 712 Poplar Street.

The error in denying the Newbrand reports to the defendants was harmless "because the Government's case was overwhelming." *United States* v. *Chieppa, supra*, p. 640. It is plain that here, as in *United States* v. *Raspovich*, 2 Cir., 241 F. 2d 779, 781: "What must have convinced the jury beyond a reasonable doubt that appellants were guilty as charged, and what has produced in our minds a settled impression that the error lacks substance, is the overwhelming evidence of the various witnesses, which tallies perfectly with the exhibits and the attendant circumstances." As in *Lutwak* v. *United States*, 344 U. S. 604, 619, "This record fairly shrieks the guilt of the parties."

Appellants list as a further point involved in their appeal the denial of a speedy trial. The record shows that during the pendency of the cases against them the defendants themselves repeatedly and successfully sought delay and further time in which to prepare for their defense. Their complaint upon this point is a frivolous one.

Finally the appellants make the following purported assignment of error: "8. That the Court below erred in various respects in refusing to admit certain evidence on behalf of the defendants and with respect to the adequacy of the charge to the jury." That is not the succinct statement of a question involved contemplated by our Rule 17.[16] Nevertheless we have examined the evidence and the instructions sought to be referred to here by the appellants. We find no error in respect to any of these matters. Furthermore, after the charge was given, none of the defects now claimed by appellants were stated as ground of objection as required by Rule 30, Rules of Criminal Procedure. The evidence rejected related to periods long prior to the dates material here, and was wholly irrelevant.

The judgments are affirmed.

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[16] Rule 17 reads in part as follows: "Briefs. (a) Contents of appellant's brief. The brief for appellant or petitioner shall contain in the order here stated—(1) a concise abstract or statement of the case, presenting succinctly the questions involved, the manner in which they are raised and the errors claimed; * * *."